THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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Docket No. 2017-0142

In re: Appeal of N. Miles Cook III

Rule 10 Appeal from Administrative Agency
(Wetlands Council)

REPLY BRIEF OF N. MILES COOK III

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ARGUMENT

I. Administrative Gloss is Not Applicable to the Definition of Need

In its Brief, the Department of Environmental Services asks this Court to apply the doctrine of administrative gloss. In particular, the Department asks the Court to find "need" under Env-Wt 302.04(a)(1) cannot be met where one can access a community dock on a different property. DES Brief, 8-14. Administrative gloss is only applicable where (1) the statute is ambiguous and (2) an agency has consistently applied the ambiguous statute in the same manner over a number of years. *Nash Family Inv. Properties v. Town of Hudson*, 139 N.H. 595, 602 (1995). Neither element is applicable in this case.

First, the term "need" is not ambiguous. Need can and has been applied by DES using its normal and customary definition. *In re Town of Nottingham*, 153 N.H. 539, 553 (2006) (utilizing Webster's Dictionary to hold "need" means whether the proposal before DES is "requisite, desirable, or useful.") Need is the first of 20 factors to be considered under Env-Wt 302.04(a) and simply means whether one needs a permit for the particular project. See *Appeal of Lake Sunapee Protective Ass'n,* 165 N.H. 119, 128 (2013) (in the context of permits for boat launches that "the phrase 'as necessary' [means] that a *permit* is necessary for the project—*i.e.*, that without it, the project cannot be completed." Where need is not ambiguous, administrative gloss is inapplicable. *In re Kalar*, 162 N.H. 314, 322 (2011)("Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine.")

Second, even if "need" was ambiguous, the Department has not consistently applied a need requirement in the same way over a number of years. Even in its Brief to this Court, the Department asserts that "because of the variety of permit applications, this analysis has to be

made on a case by case basis." DES Brief, p. 7. Applying a requirement on a case by case basis is the antithesis of consistency.

In this case alone, the Department cites at least three different ways of applying need, two of which were specifically rejected by the Wetlands Council.[1] The only definition not completely rejected by the Wetlands Council has only been applied in this fashion against Mr. Cook. The Department does not cite any applicant, other than Mr. Cook, who has had his permit denied because he could access a community dock.[2] In fact, during deliberations, the Wetlands Council acknowledged that it was not aware of any other applicants having "need" applied in the same manner as the Department was applying it against Mr. Cook. CR 573(Transcript of 8/30/16 Deliberations at 61:8 to 61:24).

Where "need" is not ambiguous and the Department's requested application is different than has been applied against any other applicant, the doctrine of administrative gloss is simply not applicable. Need can mean simply need for a permit similar to *Appeal of Lake Sunapee Protective Ass'n,* 165 N.H. 119, 128 (2013) or need can mean "requisite, desirable, or useful" as this Court held in *In re Town of Nottingham,* 153 N.H. 539, 553 (2006). But need cannot be defined to add new substantive requirements not present in the statute. *See In re Mays*, 161 N.H. 470, 473-76 (2011).

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[1] The Department argued to the Wetlands Council that in order to meet the requirement of "need" that "tidal waters private docking structures must possess 'public good.'" See CR 183 & Add. 9; see also CR 158, ¶ 5. This definition of "need" cannot be subject to administrative gloss where the Wetlands Council specifically rejected the Department's proffered definition of need. See CR 183 & Add. 9. The Department secondly argued that "need" means being able to access usable water. Again, the Wetlands Council specifically rejected this argument finding that if need required better access "this could be easily rectified by DES recommending and allowing a longer dock than applied for, such as the length previous[ly] applied for by the appellant and rejected by DES [in Case 13-12 WtC]." CR 183 & Add. 9. The Council deadlocked in a 5-5 tie on the Department's third proffered definition and could not decide whether "need' means that an applicant cannot access a public dock on a neighboring property.

[2] The Department's Brief implies that there is plenty of room as there are 53 potential members of the Brickyard Estates Dockowners Association and only 15 have actually paid the dues to become members. DES Brief, 1. The Department fails to mention that there is only 1 slip on the Brickyard dock to share. CR 435.

II. Requested Factual Findings Not Found By the Wetlands Council Are Not Entitled to Any Deference

The issues in this appeal are issues of law and statutory interpretation. Factual disputes are not determinative of any appellate issue. Nevertheless, the Department spends several pages in its Brief asserting disputed facts as if they were found and entitled to deference. See DES Brief, 1-5, 8-9, 14-16. "The Council's findings of fact are presumed *prima facie* lawful and reasonable." *Appeal of Michele*, 168 N.H. 98, 105 (2015); RSA 541:13. Nevertheless, factual assertions by the Department are only entitled to deference if the Wetlands Council actually made the asserted factual findings.

Factual assertions not found by the Council should not be accorded any deference. For example, the Department asserts on page 15 of its Brief, fn. 3, that "when addressing the parties' Findings of Fact, the Council found 'true' that the Appellant had not submitted sufficient evidence to establish that the Department's denial of his permit was unlawful or unreasonable." This is not accurate. In fact, although the Wetlands Council discussed the Department's request for Findings of Fact, the Wetlands Council ultimately deadlocked in a 5-5 tie and did not make the Department's requested finding. See Transcript of Deliberations at 219-220 at CR 731-732.

The Department's requested findings not found by the Council are entitled to no deference.

III. Prejudice, Although Not Required, Clearly Resulted From Allowing a Council Member to Vote After Attending Only Part of the Deliberations Resulting in a Tie Vote

The Council deadlocked in a 5 to 5 tie on whether the Department's denial was unreasonable and unlawful. Decision, p. 5 at Add. 5 and CR 141. Council Member Brown, one of the ten members who voted, was not present for the entirety of the deliberations. In its Brief, DES

concedes that Mr. Brown missed "four pages [of deliberations] in the transcript" and "council members must meet the impartiality standards constitutionally demanded [of jurors.]" DES Brief, p. 20. Nevertheless, the Department argues that "appellant can show no specific prejudice" to Council Member Brown being allowed to vote after missing part of the deliberations and that without a showing of "specific prejudice," there can be no remedy. DES Brief, 19-21.

First, the focus should not be on the effect on Council Member Brown's missing part of the deliberations but rather the effect Council Member Brown had on the decision after improperly staying on the council for the remainder of deliberations and the ultimate vote. See *Winslow v. Town of Holderness Planning Bd.*, 125 N.H. 262 (1984). In this case, great prejudice resulted from Council Member Brown being allowed to vote. Had the Council properly only allowed the nine members who were present for the entirety of the deliberations to vote, the Wetlands Council would have held the Department's decision was unreasonable and unlawful by a 5-4 vote.

Second, even if specific prejudice could not be shown, Council Member Brown's participation should have voided the entire vote. When a board is acting in a quasi-judicial capacity, a vote with a member who should not participate invalidates the entire result regardless of whether any specific prejudice can be shown. *Appeal of City of Keene*, 141 N.H. 797, 801 (1997)(board's unanimous vote was invalidated because one member should have recused himself); *Winslow v. Town of Holderness Planning Bd.*, 125 N.H. 262, 268 (1984); *Rollins v. Connor*, 74 N.H. 456 (1908)("judicial action by a tribunal one of whose members is disqualified to act is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote.")

IV. Prejudice, Although Not Required, Results From Council's Failure to Maintain a Record

Finally, the Department concedes in its Brief that the Wetlands Council violated RSA 541-A:31 by failing to keep a complete record but asserts where a statutory violation does not cause "specific prejudice," there can be no remedy for the violation. DES Brief, page 16-19. In particular, the Department cites *State v. Marshall*, 162 N.H. 657, 672 (2011) and *State v. Jerot*, 158 N.H. 181, 183 (2008), which hold a new criminal trial is constitutionally required under due process guarantee only when the failure to keep a full record results in specific prejudice.

First, in this case, the Council's obligation to maintain a record was not based in general constitutional due process but in a specific statutory requirement. Regardless of whether the failure to maintain the complete record violates due process as well, no one disputes the Wetlands Council violated RSA 541-A:31 by failing to keep a complete record. Cases applying the remedy for constitutional due process violations are not applicable to statutory violations.[3]

In addition, although the Court in *Marshall* recognized that there was no specific prejudice even alleged, specific prejudice has resulted in the present case. The Council's December 13, 2016 Order misstates the testimony from Mr. Adams on both the issue of need and whether there would be an appreciable gain in water depth. Mr. Cook has been prejudiced by being precluded from using the record to challenge these misstatements. During deliberations, different Council members recalled Mr. Adam's testimony differently. See CR 580, CR 682-683. Had the Council properly preserved the record, as it was statutorily required to do, Mr. Cook could have

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[3] Rather than comparing the statutory violation of RSA 541-A:31 to a constitutional violation, a more apt comparison would be a statutory violation under RSA 91-A. Pursuant to RSA 91-A:8, III, an agency that fails to produce minutes of a meeting can have the decisions of that meeting invalidated.

been provided a transcript so there would be no dispute as to Mr. Adam's testimony. Mr. Cook has been specifically prejudiced by being denied access to the complete record.

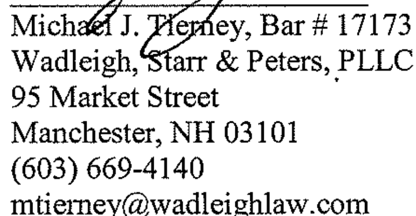
CONCLUSION

The Department acted unlawfully and unreasonably in denying the permit on the basis that Mr. Cook did not "need" a dock but could simply pay to share the use of the Brickyard community dock. Administrative gloss is not applicable as "need" is not ambiguous and the Department has not denied any other property owner a dock permit on the basis that he could access a shared community dock. Whether Mr. Cook or any other private landowner could pay to use a community dock on a different property is not relevant to whether one can wharf out on their own shorefront property. *Opinion of the Justices*, 139 N.H. 82, 90 (1994) ("[p]rivate shorefront owners are entitled to exercise their property rights in the tidelands so long as they do not unreasonably interfere with the rights of the public.") The Department's denial should be reversed.

Respectfully submitted,

N. MILES COOK

By his attorneys,



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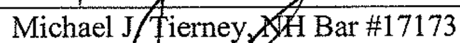
Dated: October ~~20~~ 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing was sent this ~~20th~~ 23rd day of October, 2017, by U.S. mail, postage prepaid, to Mary E. Maloney, Esq. at 33 Capitol Street, Concord, NH 03301, counsel to the Department of Environmental Services and to the Wetlands Council, Paula Scott, Appeals Clerk, P.O. Box 95, 29 Haven Drive, Concord, NH 03302-0095.



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